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No. 26

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

ALCEA BAND OF TILLAMOOKS ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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v.

ALCEA BAND OF TILLAMOOKS, ET AL.[1]

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 61–83) is reported in 59 F. Supp. 934.

[1] Besides the Alcea Band of Tillamooks, the respondents are the Yah-Quo-Nah, Seletca and Ne-A-Ches-Na Bands of Tillamooks; the Quans-Sake-Nah, Klen-Nah-Hah, Ke-Ah-Mas-E-Ton, Cah-Toch, Chin-Chen-Ten-Tah-Ta, Whiston and Klen-Hos-Tun Bands of Nas-O-Mahs or Coquilles; the Chetco Tribe; the Ko-Se-E-Chah, Se-Qua-Chee, Too-Too-To-Ny, Yah-Shute, Whis-To-Natin, Cos-Sa-To-Ny, Chet-Less-Ing-Ton, Port Orford, Eukie-Chee, Kus-So-To-Ny, Kler-It-La-Tel, Te-Cha-Quot, and Mack-A-No-Tin Bands of Too-Too-To-Neys; and portions and descendants of all such tribes and bands (R. 1).

JURISDICTION

The judgment of the Court of Claims was entered on April 2, 1945 (R. 84). A motion by the United States for a new trial was denied on June 4, 1945 (*ibid.*). The petition for a writ of certiorari was filed on August 31, 1945, and was granted on October 22, 1945 (R. 85). The jurisdiction of this Court rests upon Section 1 of the jurisdictional Act of August 26, 1935, 49 Stat. 801, and Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. sec. 288 (b).

QUESTIONS PRESENTED

1. Whether the extinguishment of unrecognized original Indian title by the United States creates a legal or equitable obligation so that respondents could recover under the special jurisdictional Act.

2. Whether respondents' original Indian title was formally recognized by the United States.

STATUTES INVOLVED

The pertinent portions of the jurisdictional Act of August 26, 1935, 49 Stat. 801, are as follows:

> * * * That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment * * * (b) [in] any and all legal and equitable claims arising under or growing out of the original Indian

title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document Numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua, and Siuslaw Tribes, it being the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast Range, the Grande Ronde, and the Siletz Reservations in said Territory.

Sec. 2. That if any claim or claims be submitted to said courts hereunder they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding the lapse of time or the statutes of limitation: * * *,

Section 1 of the Act of August 14, 1848, 9 Stat. 323, "An Act to establish the Territorial Government of Oregon," provides in part:

That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between

> the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed.

The pertinent portion of the Act of August 15, 1894, 28 Stat. 286, 323, is set forth in the Appendix, *infra*, pp. 38–44. Other statutes are set out in the findings of the Court of Claims.

STATEMENT

Pursuant to the Act of August 26, 1935, 49 Stat. 801, *supra*, pp. 2–3, which conferred jurisdiction on the Court of Claims to adjudicate "legal and equitable claims arising under or growing out of the original Indian title," tribes or bands of the Tillamook, Coquille, Too-Too-To-Ney, and Chetco Indians brought this suit to recover compensation for the alleged taking of lands in which the tribes asserted possessory rights by virtue of original Indian title, as opposed to a recognized right of occupancy (R. 1–20).[2] Each of the four tribes, who lived principally along the rivers and creek banks (Finding 11, R. 39), alleged title solely by

[2] Several other tribes also joined in the suit, but since the claims of these Indians have been dismissed for various reasons (R. 61, 62–69), only the claims of the Tillamooks, Coquilles, Too-Too-To-Neys, and Chetcos are involved in this Court.

virtue of exclusive occupation and use to large areas in the State of Oregon between the Pacific Ocean and the Coast Range of mountains (R. 4, 5–6). According to statistics of the General Land Office of the Department of Interior, the territory so claimed by the Tillamooks (Finding 8, R. 37) has been estimated to embrace approximately 1,152,410 acres (see Finding 5, R. 35), while that claimed by the Coquilles (Finding 10, R. 38–39) consists of about 722,530 acres. The area occupied by the Too-Too-To-Neys and Chetcos (Finding 9, R. 37–38) has been estimated as approximately 897,640 acres.[3] The claims of the four tribes were based upon the following facts as found by the Court of Claims:

In 1855, acting under authority of the Act of June 5, 1850, 9 Stat. 437, the Superintendent of the Oregon Indian Agency negotiated a treaty with respondents and other tribes (Findings 2, 3, 4, R. 24–25, 28, 32). By this treaty the Indians agreed to cede to the United States all the lands to which they claimed title, provided that a described portion of the ceded lands be set aside "until otherwise directed by the President" as a

[3] In 1855 the Too-Too-To-Neys, Chetcos, and Coquilles had an aggregate population of about 1,311 (Finding 5, R. 35), while the Tillamooks numbered about 200. See Sen. Doc. No. 11, pt. 1, 35th Cong., 1st sess., pp. 642, 645. Thus, the alleged holding of the Tillamooks averaged about 5,750 acres for each member of the tribe, while for the four tribes the average was approximately 1,800 acres.

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residence for the signatory Indians and "such other bands or parts of bands as may, by direction of the President of the United States, be located thereon" (Finding 3, R. 29). The agreement also provided for cash payments and the undertaking of other obligations by the United States as consideration for the cession (Finding 3, R. 30–31). This treaty was never ratified by the Senate (Findings 2, 4, R. 26, 32–34). However, by Executive order of November 9, 1855, a conditional reservation, to be subject to future curtailment if found proper, was set aside for the use of those Indians who had signed the treaty and such other tribes as the President might designate (Finding 13, R. 40–47). This reservation, known as the Coast or Siletz Reservation, consisted of a long strip of land about 120 miles north and south by 20 miles east and west and contained approximately 1,100,000 acres (Finding 15, R. 48). This tract was composed in part of a portion of the lands exclusively occupied by bands of Tillamooks, and its boundaries were almost the same as those of the reservation described in the treaty (Findings 12, 16, R. 39, 48). Respondent bands and other tribes were immediately removed to the reservation (Findings 3, 12, 19, 37, R. 28, 39, 49–50, 59–61), and the remaining lands in the area described in the treaty were opened for settlement as public lands of the United States (Finding 18, R. 49).

By Executive Order of December 21, 1865, a strip of approximately 320,000 acres was withdrawn from the center of the reservation and was immediately opened for settlement, the Indian occupants being removed to the diminished reservation (Finding 21, R. 50–51). By the Act of March 3, 1875, 18 Stat. 420, 446, Congress ratified the Executive Orders of 1855 and 1865 and further diminished the reservation by withdrawing tracts located at the north and south ends of the original reservation (Finding 22, R. 51–52). The Indian occupants were removed to portions of the diminished reservation, and the newly withdrawn lands were opened for settlement (Finding 22, R. 52).

After 1887, allotments of land were made to Indians of respondent and other tribes who were permanently located on the diminished Siletz Reservation (Finding 23, R. 53).[4] Thereafter, in 1892 the United States and the tribes residing on the reservation entered into an agreement, subsequently ratified by the Act of August 15, 1894, 28 Stat. 286, 323 (Appendix, *infra*, pp. 38–44), by which the Indians ceded 178,840 acres, all the unallotted lands except for 5 sections within the diminished reservation, for a consideration of $142,600, part of which was immediately paid to

[4] Only 594 Indians, including members of respondent bands and other tribes, claimed allotments. Report of Commissioner of Indian Affairs (1894), p. 267.

the Indians per capita, with the balance of $100,000 being deposited at interest in the Treasury to the credit of the various bands located on the reservation (Finding 23, R. 53). These ceded lands were opened for settlement early in 1895 (*idem*). In 1900 Congress provided for the distribution of the $100,000 on deposit, together with accrued interest, to individual Indians residing on the reservation (Finding 24, R. 53). In 1910 Congress authorized the sale of the remaining 5 sections, and in 1916 the proceeds of such sale, after deductions for expenses incurred, were distributed per capita to enrolled members of the resident tribes (Findings 25, 26, R 53–54).

Under these circumstances the United States contended that it had not recognized or acknowledged that respondent tribes or bands had any right of occupancy in the areas claimed by them, that consequently respondents had no legal or equitable interest in the lands as against the United States, and that, therefore, the court had no jurisdiction to award recovery for the extinguishment of the Indian title. The Court of Claims overruled this contention, being of the opinion that even absent a recognition of a right of occupancy, respondents had such a legal interest in lands exclusively occupied from time immemorial that the lands could not be taken by the United States without payment of just compensation therefor (R. 70–77). The court also held that even if direct recognition of Indian title were

necessary to support recovery, the requisite recognition was furnished by the Act of August 14, 1848, 9 Stat. 323, *supra*, pp. 3–4, which declared that the rights of Indians to property in Oregon were protected until extinguished by the United States (R. 74–75).

The Court of Claims found that each of respondent tribes possessed Indian title, by virtue of exclusive occupancy from time immemorial, to areas with clearly defined boundaries as alleged in the petition (Findings 6, 7, 8, 9, 10, 11, R. 35–39). The court also found that these lands had been taken by the United States for a public purpose on or shortly after the issuance of the Executive Order of November 9, 1855, without the payment of just compensation (Findings 17, 18, 34, R. 49, 58), and concluded that the tribes were entitled to recover (R. 61). It was indicated that the recovery was to be measured by the value of the lands as of November 9, 1855, plus interest at a reasonable rate, but that this recovery should be offset by the value as of November 9, 1855, of those portions of the reservation in which the tribes were recognized to have had a beneficial interest through allotments in severalty and the distribution per capita of the proceeds of the unallotted lands remaining on the reservation as it existed in 1894 R. 82–83). On April 2, 1945, an interlocutory judgment was entered holding respondents entitled to recover, but the determination of the amount of recovery and the amount

of any offsets was reserved for further proceedings under Rule 39 (a) of the Court of Claims (R. 84).[5] The opinion, entered the same day, was written by the Judge Littleton, Chief Justice Whaley dissenting without opinion and Judge Jones taking no part (R. 83). On June 4, 1945, a motion by the United States for a new trial was denied (R. 84).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that respondents were entitled to recover compensation for the taking by the United States of their unrecognized original Indian title.

2. In holding that respondents' original title had been recognized by the United States especially in the absence of a finding to support such a holding.

3. In entering judgment against the United States.

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[5] Rule 39 (a) of the Court of Claims provides:

"In every Indian case, unless otherwise ordered by the court or stipulated by the parties, the hearing in the first instance shall be limited to the issues of fact and law relating to the right of the plaintiff to recover, and the court shall enter its judgment adjudicating that right. If the court holds in favor of the plaintiff, the judgment shall be in the form of an interlocutory order, reserving the determination of the amount of the recovery and the amount of offsets, if any, for further proceedings. After the entry of such an interlocutory order, either party may move for a new trial under the provisions of Rules 91 to 97, inclusive."

SUMMARY OF ARGUMENT

I

The special jurisdictional Act (*supra*, pp. 2–3) under which this suit was filed, authorized the Court of Claims to adjudicate "any and all legal and equitable claims arising under or growing out of the original Indian title" asserted by respondents. "Original Indian title" is the claim by an Indian tribe of the right because of immemorial occupancy to roam certain territory to the exclusion of any other Indians, and must be distinguished from a formally recognized Indian title. In holding that respondents were entitled to recover, the court below misconceived the force of the jurisdictional Act and failed to distinguish between recognized and unrecognized original Indian title.

A

The Court of Claims assumed that the jurisdictional Act authorized the entry of a judgment for compensation merely upon the establishment of the fact of original Indian title. But a jurisdictional Act does not admit any legal liability, and merely provides "a forum for the adjudication of the claim according to applicable legal principles" (*United States* v. *Millie Lac Chippewas*, 229 U. S. 498, 500) by waiving the Government's immunity from suit. Neither the language nor the legislative history of the present

Act indicates an intention that it should be more broadly construed.

B

In holding that the United States was liable for the taking of an unrecognized Indian title in 1855, the Court of Claims considered that as against the United States, the Indians possessed the same rights under the unrecognized original title as under a recognized title, and that the unrecognized Indian title could be constitutionally extinguished only by purchase. However, although Indian title, whether recognized or not, is protected against the acts of others than the United States, unrecognized Indian title can be terminated by the sovereign at will. By discovery the European nations claimed exclusive title to the lands of the New World subject only to a temporary right of Indian occupancy, and asserted the exclusive power to extinguish the original Indian title or right of occupancy by purchase, the sword, or any other manner. The United States acquired the same title by discovery when it took over sovereignty, and its obligation upon taking Indian lands so occupied was understood at the time of the events here in question, and repeatedly characterized since, as a moral or political, not a legal, obligation. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347; *Shoshone Indians* v. *United States*, 324 U. S. 335, 339.

Historically, the United States found it advisable to enter into treaties with various Indian tribes guaranteeing to the Indians a perpetual right of occupancy, thus transforming the original Indian title into a recognized title. Such a perpetual right of occupancy is protected against an uncompensated taking by the United States. However, even though most of the Indian lands were eventually so held, the policy of enlarging Indian rights of occupancy did not of itself transform all temporary rights of occupancy into permanent rights, and lands still held under unrecognized Indian title may be taken by the United States without liability. It is only the recognized Indian title which is as sacred as the fee when the United States is involved.

Since lands occupied by Indians under original title are essentially public lands of the United States, the rights of such Indians as against the United States are no greater than those of stockmen or settlers who made use of the public lands before they were opened for purchase or homesteading.

II

The recognition necessary to support liability for a taking must be such as to amount to a guarantee of a perpetual right of occupancy to the Indians. The Court of Claims made no finding of such recognition, but in its opinion assigned as an

alternative ground for decision that respondents' original Indian title had been recognized by the United States. The 1848 statute relied upon by the court shows at most only an intention to preserve the *status quo*, and does not furnish the requisite recognition. Further, inasmuch as Congress alone may dispose of the public lands, the recognition cannot be supplied by reference to the acts of Government officials.

ARGUMENT

I

THE UNITED STATES IS NOT LIABLE TO MAKE COMPENSATION FOR THE EXTINGUISHMENT OF UNRECOGNIZED INDIAN TITLE

The jurisdictional Act of August 26, 1935, 49 Stat. 801, *supra*, pp. 2–3, under which this suit was filed, authorized the Court of Claims to adjudicate "any and all legal and equitable claims arising under or growing out of the original Indian title" asserted by respondent tribes and bands. As this Court recently pointed out in *Shoshone Indians* v. *United States*, 324 U. S. 335, 338–339, "original Indian title" means the claim by an Indian tribe of the right because of immemorial occupancy to roam certain territory to the exclusion of any other Indians, such title to be distinguished from an Indian title which has been formally recognized, acknowledged or confirmed by the sovereign. Cf. *Barker* v. *Harvey*, 181

U. S. 481, 491–492. Hence, the principal legal issue presented by this case is whether the United States is legally liable to compensate an Indian tribe for the extinguishment or taking of an unrecognized Indian title.*

Prior to the decision below, no court has ever held the United States to be so liable. *Shoshone Indians* v. *United States*, 324 U. S. 335, 339. It is true that the Government may not constitutionally take lands held under recognized Indian title or right of permanent occupancy without making compensation therefor (*Shoshone Tribe* v. *United States*, 299 U. S. 476), and that private individuals may not with impunity interfere with a tribe's possessory rights based upon Indian title whether or not such title has been formally recognized by the sovereign. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347. But such cases are quite different from the instant case either because they involved a tribal title of a different nature or because they concerned private persons claiming adversely to the Indians. It has been the Government's contention throughout that these distinguishing features are of paramount importance to the correct disposition of this case, and that the United States should not be held liable

* Hereafter in this brief the term "Indian title," unless further qualified, will be used to signify the unrecognized original Indian title or right of occupancy as opposed to a recognized Indian title or right of occupancy. Cf. *Shoshone Indians* v. *United States*, 324 U. S. 335, 339.

for the extinguishment or taking of Indian title unless such title had been recognized or confirmed by Congress or by the sovereign from which the United States had acquired its interest in the lands.' We submit that the failure of the Court of Claims to accept the Government's contention was due to a misconception of the force of the jurisdictional Act and a misinterpretation of the effect of prior judicial decisions dealing with the question of Indian title in general.

A. *The jurisdictional Act did not create the liability.*—In arriving at its decision that respondents were entitled to recover, the Court of Claims first assumed that the jurisdictional Act under which this suit was filed (*supra*, pp. 2–3) authorized the entry of judgment for compensation merely upon the establishment of a claim of Indian title by occupancy from time immemorial (R. 21). However, it is well settled that a special jurisdictional Act does not admit any legal liabil-

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[1] In their brief in opposition to the petition for certiorari (p. 7) respondents imply that the United States in this case has taken a position inconsistent with that taken in *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339. But the contention now made, namely, that the United States may extinguish unrecognized Indian title without liability, was clearly distinguished from the issue in that case, which was the enforceability of Indian title against private individuals. See Brief for the United States (prepared by attorneys of the Interior Department), pp. 15–17, 36, 40, 41; Reply Brief for the United States (prepared by attorneys of the Interior Department), pp. 4–5; and the Memorandum for the Government of the United States submitted by the Solicitor General.

ity on the part of the Government, but merely provides "a forum for the adjudication of the claim according to applicable legal principles." *United States* v. *Mille Lac Chippewas,* 229 U. S. 498, 500; *Turner* v. *United States,* 248 U. S. 354, 358. "No cause of action can be vindicated thereunder unless such a cause of action as, apart from the impediment of governmental immunity from suit, was already in existence." *Shoshone Tribe* v. *United States,* 299 U. S. 476, 493. As Mr. Justice Holmes said of a similar jurisdictional Act in *The Sac and Fox Indians,* 220 U. S. 481, 489. "A merely moral claim is not made the foundation of a possible recovery. Something must be shown that amounts to a right." See also *United States* v. *Old Settlers,* 148 U. S. 427, 469.

The fact that the jurisdictional Act recites the nature of the alleged claim does not alter the rule. *United States* v. *Mille Lac Chippewas,* 229 U. S. 498; *Stanton* v. *United States,* 68 C. Cls. 379; *Randall* v. *United States,* 71 C. Cls. 152; *The Oyster Cases,* 94 C. Cls. 397. As this Court said in *Kinkead* v. *United States,* 150 U. S. 483, 498:

> It needs no argument to show that there is a wide distinction between an act directing a particular thing to be done, and an act reciting the existence of a certain fact which had long been a matter of dispute, and which the Court of Claims was authorized by the act to pass upon and determine.

In the legislative history of the present Act there is nothing to indicate that Congress intended to give to the Indians any new right other than the right to have their claims adjudicated in accordance with then existing legal principles.* See S. Rep. No. 795 and H. Rep. No. 1085, 74th Cong., 1st sess. The legislative history merely recites that "the Indians are of the belief that their claims are valid (*ibid.*)," and clearly shows that the purpose of the Act was to provide a forum for a judicial determination of the validity of such claims. Special jurisdictional Acts are to be strictly construed and implications as to jurisdiction under their terms are forbidden. *Blackfeather* v. *United States,* 190 U. S. 368; *Price* v. *United States and Osage Indians,* 174 U. S. 373. In the latter case this Court said (p. 375):

> The right of the plaintiff to recover is a purely statutory right. The jurisdiction of the Court of Claims cannot be enlarged by implication. It matters not what may seem to this court equitable, or what obliga-

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* When Congress has intended to extend the liability of the United States, it has done so in no uncertain manner. For example, in giving the California Indians a right to sue in the Court of Claims, Congress provided (Act of May 18, 1928, 45 Stat. 602):

"It is hereby declared that the loss to the said Indians on account of their failure to secure the lands and compensation provided for in the eighteen unratified treaties is sufficient ground for equitable relief."

See *The Indians of California* v. *United States,* 98 C. Cls. 583, certiorari denied, 319 U. S. 764.

> tion we may deem ought to be assumed by the Government, or the Indian tribe, whose members were guilty of this depredation, we cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume. * * *

It follows, therefore, that unless the Government was under an already existing liability to make compensation for the taking of lands held by unrecognized Indian title, there can be no recovery here.

B. *There is no liability under either the Fifth Amendment or any other rule of law.*—The United States would be liable here only if its 1855 action amounted to a taking compensable under the Fifth Amendment or constituted an implied agreement to pay the tribes. However, its obligation upon taking Indian lands occupied under a temporary right of occupancy was understood at the time of the events here in question, and repeatedly characterized since, as a moral or political, not a legal, obligation. An Indian right of occupancy, whether or not formally recognized by the sovereign, has always been protected against the acts of private individuals, but "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. * * * And

whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347. Thus, "since *Johnson* v. *M'Intosh*, 8 Wheat. 543, decided in 1823, gave rationalization to the appropriation of Indian lands by the white man's government, the extinguishment of Indian title by that sovereignty has proceeded, as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss." *Shoshone Indians* v. *United States*, 324 U. S. 335, 339.

Despite these recent admonitions to the contrary, the Court of Claims reasoned that the liability of the United States for the taking of Indian lands was the same whether the lands were held by a recognized or unrecognized Indian title, that original Indian title could be constitutionally extinguished only by purchase, and that, upon the consent of the United States to be sued on claims arising out of original Indian title, respondents were entitled to recover for the extinguishment of such title when accomplished by a method other than purchase (R. 70–77). We submit that the court's reasoning ignores basic distinctions made in the decided cases[9] and is not

[9] For example, in its opinion the Court of Claims quoted at length (R. 73–74) from that part of this Court's opinion in *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, where the protection of Indian title against private individ-

in accord with the historical development of the concept of Indian title.

Principles of international law have been deemed to require a sovereign to respect private rights in property when acquiring sovereignty by conquest or cession over territory occupied by another member of the family of nations. *Barker* v. *Harvey,* 181 U. S. 481, 486. On the other hand, as Chief Justices Marshall and Taney pointed out, all territory not in the possession of states who are members of the family of nations has been deemed open to occupation by the discovering nation, and title to such territory has vested in the occupying sovereign by virtue of the discovery. *Johnson* v. *M'Intosh,* 8 Wheat. 543, 573; *Martin* v. *Waddell,* 16 Pet. 367, 409–410; Lawrence, Principles of International Law (7th ed., 1923) pp. 148–149; Story, *Commentaries on the Constitution of the United States* (5th ed. 1891) pp. 106–107; Moore, *International Law Digest* (1906) pp. 258–259. Thus, when the European nations came to North America and found it inhabited by uncivilized Indians, it was unanimously agreed by the nations, in accordance with principles of international laws as understood by the then civilized powers of Europe, that each should have exclusive title by discovery to all territory reduced to possession. *Johnson* v. *M'In-*

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uals was discussed, but completely ignored the immediately following portion of the opinion (quoted above) where it was indicated that extinguishment of Indian title by the sovereign was a "different matter" (p. 347).

tosh, supra, pp. 572–592; *Martin* v. *Waddell, supra.* However, in order to placate the warlike and numerically superior Indian tribes and their own consciences, the Europeans treated their own exclusive title as subject to the temporary occupancy of the Indians. Until the Indian right of occupancy was extinguished, the sovereign granted the fee of the lands in the New World subject to the Indian right of occupancy, the colonists were forbidden to take possession of lands occupied by Indians without tribal consent, and the natives were permitted to use such lands according to their own discretion. *Fletcher* v. *Peck,* 6 Cranch 87, 141–142; *Johnson* v. *M'Intosh, supra,* pp. 572–584; *Martin* v. *Waddell, supra,* p. 409.

This temporary right of occupancy has come to be known as original Indian title. *Shoshone Indians* v. *United States,* 324 U. S. 335, 338–339; *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 345. But, although this Indian title was considered to be as sacred as the fee insofar as interference by private individuals was concerned, nevertheless the European sovereigns, and later the United States, claimed the paramount right to extinguish the Indian right of occupancy at will, by treaty, purchase. the sword, or the exercise of complete dominion adverse to the right of occupancy. *Fletcher* v. *Peck,* 6 Cranch 87, 142; *Johnson* v. *M'Intosh,* 8 Wheat. 543, 587–592; *Clark* v. *Smith,* 13 Pet. 195, 201; *Martin* v.

Waddell, 16 Pet. 367, 409; *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 66; *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. at p. 347; *Shoshone Indians* v. *United States*, 324 U. S. at p. 339. In essence, the sovereign claimed full ownership of the lands occupied by the Indians and merely permitted as a matter of grace a continuance of the Indian occupancy until it was desired to put such lands to other uses. However unjust it may seem that the Indians were thus unwillingly or even unknowingly deprived of their rights in the soil, that is a political matter to be determined by Congress and not by the courts. *Johnson* v. *M'Intosh*, *supra*, pp. 572, 589–592; *Worcester* v. *Georgia*, 6 Pet. 515, 543. As stated by Lawrence, *Principles of International Law* (7th ed., 1923) p. 148, "The rights of the natives are moral, not legal."

Hence, it is plain that the rights under original Indian title are in all material respects no greater than the Indians' rights in reservations carved from the public domain by executive order, which rights can be terminated at any time without liability. *Sioux Tribe* v. *United States*, 316 U. S. 317. Just as in the case of an executive order reservation, it is the absence of a legal liability, rather than, as the court below thought (R. 71, 75), the Government's immunity from suit, which prevents recovery for the taking of original Indian title. It is clear, therefore, that when the United States extinguished respondents' original Indian

title, the Government was at the most under merely a moral obligation to make compensation therefor, so that there can be no basis for the legal liability necessary to support recovery under the present jurisdictional Act. In its dealings with Indian title, as Mr. Justice Holmes has stated, the United States "bound itself only by honor, not by law." *Conley* v. *Ballinger*, 216 U. S. 84, 90; see also *The Sac and Fox Indians*, 220 U. S. 481, 489; *United States* v. *Old Settlers*, 148 U. S. 427, 469; *Beecher* v. *Wetherby*, 95 U. S. 517, 525; cf. *Cummings* v. *Deutsche Bank*, 300 U. S. 115.

The error in the Court of Claims' conclusion to the contrary arises, in part, from its failure to consider the important distinction between recognized and unrecognized Indian title. Of course, original Indian title is not the only basis for the Indian right of occupancy; the generic term "Indian title" has various shades of meaning. See Cohen, *Handbook of Federal Indian Law* (1942), pp. 291–305. From the beginning, the European sovereigns, in order to obtain protection against the Indians and each other, entered into treaties of alliance with the Indians and in some instances promised them a perpetual right to occupy defined areas free from interference by the whites. After indepeindence the United States followed the same policy of making treaties with various tribes, so that at a very early date most of the Indian lands

were held under a treaty-recognized right of occupancy. *Worcester* v. *Georgia,* 6 Pet. 515, 546–550; *Mitchel* v. *United States,* 9 Pet. 711, 745–756; *Beecher* v. *Wetherby,* 95 U. S. 517, 525; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 496. When by treaty or Act of Congress the United States has guaranteed to Indians the perpetual and exclusive right to occupy a defined area, the Indians have thereby acquired a vested property right in such lands which is protected by the Fifth Amendment and cannot be taken by the United States without the payment of just compensation. *Chippewa Indians* v. *United States,* 301 U. S. 358, 375–376; *United States* v. *Klamath Indians,* 304 U. S. 119; *Shoshone Tribe* v. *United States,* 299 U. S. 476, 497; *United States* v. *Creek Nation,* 295 U. S. 103, 109–110. This is so even though the United States has an unlimited power to manage and control the lands, and the Indians could not dispose of such lands to others without governmental consent (*ibid.*).

But merely because it has been the policy of the ruling sovereign to enlarge upon the Indian right of occupancy and create vested property rights it does not follow that the original Indian title is to be transformed into some greater right when the sovereign has not specifically done so. There is nothing inconsistent in the fact that some tribes at one time had merely a temporary right of occupancy and later a permanent right, or that some

tribes have never had anything but a temporary right subject to extinguishment at the will of the sovereign. The distinction has always been maintained. *Barker* v. *Harvey*, 181 U. S. 481, 491–492; *Shoshone Indians* v. *United States*, 324 U. S. 335, 338–339. A plain indication of the difference between recognized and unrecognized Indian title is given in *Barker* v. *Harvey*, 181 U. S. 481, where claimants under a patent from the United States in confirmation of Mexican grants prevailed over Mission Indians of California who claimed rights by virtue of aboriginal possession, for it was held that Mexico had never recognized the Indian title (p. 499). It was there stated (pp. 491–492):

> * * * it could not well be said that lands which were burdened [by Mexican recognition] with a right of permanent occupancy were a part of the public domain and subject to the full disposal of the United States. There is an essential difference between the power of the United States over lands to which it has had full title, and of which it has given to an Indian tribe a temporary occupancy, and that over lands which were subjected by the action of some prior government to a right of permanent occupancy, for in the latter case the right, which is one of private property, antecedes and is superior to the title of this government, and limits necessarily its power of disposal.

Here is a clear statement of the paramount distinction between recognized and unrecognized In-

dian title which the Court of Claims ignored. Aboriginal possession creates against the United States only a temporary right of occupancy which can be terminated at will without liability. It is only when a permanent right of occupancy is guaranteed by treaty or Act of Congress that the Indians acquire property rights entitled to protection by the Fifth Amendment.

The Court of Claims considered (R. 71, 73) that the only effect of treaties which acknowledge and guarantee title to the Indians was that the Indians reserved their original title to certain of their lands while relinquishing all claim to other areas, so that their interest in the lands retained was no greater than prior to the treaty. This view attaches too much force to the original Indian title. The true effect of such treaties was that the Indians abandoned all rights from aboriginal possession to part of the lands claimed by them, while the sovereign gave up its unlimited right to extinguish the right of occupancy in the lands reserved by transforming the temporary right of occupancy into a permanent property right. Cf. *Barker* v. *Harvey*, 181 U. S. 481, 491–492. The fact that acknowledgment by Congress enlarges and makes permanent the temporary right of occupancy rather than creating a completely new title (*United States* v. *Klamath Indians*, 304 U. S. 119, *California & Oregon Land Co.* v. *Worden*, 85 Fed. 94 (C. C. Ore.)) does not

mean that the unrecognized Indian title is a permanent property right.[10]

Because of the fact that in most instances the Indians hold their lands under recognized Indian title there is much language in the reported opinions which, if taken to apply to original Indian title as well, would support the view that the United States could not extinguish such title without incurring the liability of paying just compensation. But, when the distinctions between recognized and unrecognized title and between the actions of the United States and others are kept in mind, it becomes clear that these cases are not contrary to the Government's position here. For example, in many cases it has been stated that the Indian "right of occupancy is considered as sacred as the fee simple of the whites." *Mitchel* v. *United States,* 9 Pet. 711, 746; *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 48; *United States* v. *Cook,* 19 Wall. 591, 593; *Leavenworth &c. R. R. Co.* v. *United States,* 92 U. S. 733, 755; *Beecher* v. *Wetherby,* 95 U. S. 517, 526. However, in none of these cases was there involved a controversy between Indians and the United States, and the Court was referring to the Indian rights against others than the Federal Government. Cf. *Lone*

[10] In many instances the Indians relinquished all claim to lands outside the treaty area, no attempt being made to describe particularly the area previously claimed. See Treaty with Sioux Tribe of 1868, Art. 2, 15 Stat. 635; Treaty with Poncas Indians of March 12, 1858, 12 Stat. 997; Treaty with the Sac and Fox Indians of 1842, 7 Stat. 596.

Wolf v. *Hitchcock*, 187 U. S. 553, 565. Moreover, in all the cases a treaty right of occupancy was involved. In cases where the controversy was between the United States and the Indians, the Court has been careful to indicate that it is the "pledged" or "perpetual" right of occupancy which is as sacred as the fee. *United States* v. *Shoshone Tribe*, 304 U. S. 111, 116; *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497. It is clear, therefore, that there is nothing in the decided cases indicating that the United States would be liable for destroying the original, unrecognized Indian title or right of occupancy. To the contrary, all the indications are the other way.

The fact that, as against others than the sovereign, original Indian title has been protected by the courts (*United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339) is not derogatory of the principle that the United States might extinguish such title at will. The protection afforded against private individuals is merely a corollary to the principle that none but the sovereign could disturb the Indians' occupancy. Cf. *Johnson* v. *M'Intosh*, 8 Wheat. 543, 573. Merely because the Indians had rights protected by the courts against actions of others than the United States, it does not follow that they had any enforceable rights against the United States.

The resulting situation is not unique in the application of public land laws. Stockmen had an implied license to graze their stock on the

public lands, such license being the basis of rights between individuals, but not as between the licensee and the United States. *Buford* v. *Houtz*, 133 U. S. 320; *Light* v. *United States*, 220 U. S. 523. Even when formally recognized by regulations and the granting of permits, the license could be withdrawn by the Government without payment of compensation. *Osborne* v. *United States*, 145 F. (2d) 892 (C. C. A. 9). Similarly, long before the public lands were thrown open to homesteading or purchase, settlers were allowed to take possession by implied license of the United States. They thereby acquired rights which were good against all the world except the United States. *Tarpey* v. *Madsen*, 178 U. S. 215, 221. They could sell their rights (*Lamb* v. *Davenport*, 85 U. S. 307), and could maintain actions in trespass and to recover possession. *Wamble* v. *Evants*, 23 Ariz. 307; *Taylor* v. *Woodward*, 10 Cal. 90; *Maydole* v. *Watson*, 7 Idaho 66. Congress recognized their status by giving them preference and preemption rights in the purchase or homesteading of the land when it was thrown open for private acquisition. *Tarpey* v. *Madsen*, 178 U. S. 215; *Frisbie* v. *Whitney*, 76 U. S. 187, 194. Nevertheless, the settlers acquired no vested rights against the United States or its grantees (*Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260; *Northern Pacific Railroad Co.* v. *Colburn*, 164 U. S. 383; *Frisbie* v. *Whitney*, 76 U. S. 187, 194), and they were not entitled to any compensation for the land or improvements upon their removal by

authorization of Congress. *Russian-American Co. v. United States,* 199 U. S. 570. We submit that the Indians by virtue of their original title had no greater right as against the United States in the lands occupied by them than did these stockmen or settlers.

The court below stated that with one qualified exception in the case of Indians in California, the United States has "consistently conceded and recognized that Indians had a beneficial possessory ownership in lands used and exclusively occupied by them" (R. 72, see also R. 73). The practice of Congress in recognizing its moral obligation to the Indians, does not, of course, establish the existence of an enforceable right absent such recognition. Moreover, it has not been the policy of the Government to recognize rights of the Indians to all of the territory claimed by them. On the contrary, in the many treaties upon the subject, the Indians were given rights to smaller, well defined areas and were obliged to relinquish their claims to the larger areas. For example, the unratified treaty of 1855 required relinquishment of respondents' claim to the land here involved and set aside the Siletz reservation for them (R. 8). Cf. *United States* v. *Klamath Indians,* 304 U. S. 119; see Cohen, *Handbook of Federal Indian Law* (1942), pp. 62–63, 65, and treaties there cited.

The opinion below relied upon *The Assiniboine Indian Tribe* v. *United States,* 77 C. Cls. 347, to support its conclusion (R. 77). But in that case

the question here was not reached because the plaintiff failed to prove title by immemorial possession (77 C. Cls. at p. 370). In the court below the United States relied upon *Duwamish, et al. Indians* v. *United States*, 79 C. Cls. 530, certiorari denied, 295 U. S. 755, and particularly on the following language of that opinion (p. 600):

> We are of the opinion that this court is without jurisdiction in a case between tribal Indians and the United States for the recovery of the alleged value of lands thrown open to public settlement by an act of Congress, in the absence of a treaty or an act of Congress recognizing the Indians' title by right of occupancy to the same. The special jurisdictional acts do not confer such jurisdiction * * *, and the issue is a political and not a judicial one.

The opinion below distinguished this case on the ground that the *Duwamish* jurisdictional Act did not authorize a suit based on aboriginal Indian title (R. 76). The Government believes the court below erred because the jurisdictional Act in the *Duwamish* case conferred on the Court of Claims jurisdiction to adjudicate "all claims of whatever nature, both legal and equitable" which certain named tribes "with whom no treaty has been made" might have (79 C. Cls. at p. 532). In any event, we submit that the language of the opinion above quoted indicates that recognition of the title by right of occupancy, by an Act of Congress or by a treaty was a necessary prerequisite to recovery.

If Congress has not seen fit to establish an obligation and specify the cases and contingencies in which the liability of the Government is submitted for judicial determination, the courts may not substitute their judgment for that of Congress, which has an absolute discretion over the liability of the United States to suit. *Schillinger* v. *United States,* 155 U. S. 163, 166.

II

RESPONDENTS' ORIGINAL INDIAN TITLE HAS NOT BEEN FORMALLY RECOGNIZED

As has been shown (*supra,* pp. 14–32), the United States is under no legal obligation to pay compensation for the extinguishment of original Indian title unless it has formally recognized such title. Merely a recognition of the principle that the Indians had some rights, especially against private individuals, flowing from their original Indian title is not sufficient to impose the liability. There must be a recognition or confirmation of a specific claim by an Indian tribe to rights of occupancy in a definite area, such recognition being by treaty or Act of Congress. Even the recognition by treaty must be such as to show an intention to do more than merely recognize the *status quo* by conceding that a tribe has original title or temporary right of occupancy in lands claimed. Cf. *Shoshone Indians* v. *United States,* 324 U. S. 335. Before an Indian tribe can become vested with any property rights as against

the United States, it must be shown that the United States has recognized the Indian title to the extent of guaranteeing undisturbed, exclusive and perpetual occupancy. Cf. *Shoshone Tribe* v. *United States*, 299 U. S. 476.

Although the Court of Claims made no finding that the United States had recognized respondents' original title,[11] it attempted to buttress its opinion by holding that in any event the Act of August 14, 1848 (*supra*, pp. 3–4) amounted to a recognition of Indian title (R. 74). The absence of a necessary finding may not be cured by statements in the opinion. *United States* v. *Seminole Nation*, 299 U. S. 417, 422; *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205–206. Moreover, it is clear that Section 1, which the court below relied upon and which merely acknowledged the principle that the Indian right of occupancy under original title was subject to protection until ex-

[11] In their brief in opposition (pp. 2–3) respondents imply that recognition was found in Finding 20 (R. 50) which reads as follows:

"Failure to ratify the treaty of August 11, 1855, left the recognized original Indian title, which the United States took without making compensation, in the Tillamook, Coquille, Too-too-to-ney, and Chetco tribes; and left the United States without legal or equitable rights, under principles applicable to the recognized aboriginal Indian use and occupancy title, to take and treat the lands, exclusively held and possessed by the particular tribes, as public lands without payment of just compensation."

The "finding" is in reality a conclusion of law, and even if it be considered a finding of fact, it does not in form purport to be a finding that the original Indian title had been recognized.

tinguished, does not constitute recognition. When read in its entirety, it is plain that Section 1 is nothing more than a declaration of the historic policy of protecting the Indian title against encroachment by settlers and other private interests, with a complete reservation of all the Government's rights, including the right to extinguish the Indian title without liability. Manifestly, the language used is not sufficient to support a finding of recognition of original Indian title. Cf. *Shoshone Indians* v. *United States*, 324 U. S. 335.

In any event, subsequent administrative and legislative action, which may be examined to aid interpretation, is conclusive that the 1848 Act had no such effect. Cf. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 309; *Brooks* v. *Dewar*, 313 U. S. 354, 361. It was not until after the passage of the Act of June 5, 1850, 9 Stat. 437, authorizing the negotiation of treaties with respondents and other tribes, that the United States appointed agents to ascertain what tribes occupied the area and what lands they claimed (Findings 2, 5; R. 24–25, 34). Obviously, it cannot be logically contended that two years earlier Congress had intended to recognize the Indian title to defined areas when Congress had not yet been officially informed of the existence of the tribes and what lands they claimed. As a matter of fact, apparently the Treaty of 1855 was not ratified because of conflicts between the claims of the various tribes in Oregon (Finding 2, R. 26). More-

over, the court's holding that the 1848 Act amounted to a recognition is obviously inconsistent with its finding (Finding 35, R. 58; see opinion, R. 82–83) that Congress had not recognized any tribal rights in the 1855 Siletz Reservation until 1894.[12] Surely, if the Act of March 3, 1875 (R. 51–52) was not a recognition by Congress of definite rights in the reservation, the 1848 Act cannot be said to be a recognition of Indian title in any specified area.[13]

The Court of Claims also relied upon an opinion of the Attorney General, 7 Op. A. G. 293, 299 (R. 75), and respondents may point to the words and acts of various government officials (see Brief

[12] As the court below correctly understood (R. 82–83), the Act of August 15, 1894 (Appendix, *infra*, pp. 38–44) dealt with the reservation as it existed at the time of the 1892 agreement (see Statement *supra*, p. 7) and did not constitute a recognition of Indian title to the lands involved here.

[13] It is the Government's position that inasmuch as the Act of March 3, 1875, 18 Stat. 420, 446, which authorized removal of the Indians from a portion of the lands which were thrown open to settlement, was conditioned upon consent of the Indians and they did consent to such removal (Finding 22, R. 51–52), no recovery may be had for a taking of such lands, even if aboriginal title constitutes a sufficient foundation for recovery. *Cf. United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 356–358. Since the judgment of the court below merely determines that the plaintiffs are entitled to recover and reserves for future proceedings the amount thereof (R. 84), this contention has not been further briefed at the present time, nor have questions concerning the proper treatment of the allowance to the United States for lands or the proceeds thereof, which the respondents have actually received (R. 82), nor similar questions as to the amount of the recovery.

in Opposition to Petition for Writ of Certiorari, pp. 13–18), as supplying the requisite recognition. As for the opinion of the Attorney General, it, like the 1848 Act, is merely a recognition of the principle that, until extingished, original Indian title is protected against interference by private individuals. Moreover, inasmuch as lands occupied by Indians under original title are for all practical purposes public lands of the United States (*supra*, pp. 19–23), and since Congress alone has the power to dispose of the Government's interests in the public lands (*Sioux Tribe* v. *United States*, 316 U. S. 317, 326), it is difficult to see how the Attorney General or any other public official could release the Government's right thereto without authorization so to do from Congress. Such authorization is entirely lacking here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and with directions to dismiss the petition.

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DECEMBER 1945.

APPENDIX

1. Section 15 of the Act of August 15, 1894, 28 Stat. 286, 323, provides:

> Whereas Reuben P. Boise, William H. Odell, and H. H. Harding, duly appointed commissioners on the part of the United States, did, on the thirty-first day of October, eighteen hundred and ninety-two, conclude an agreement with the chiefs, headmen, and other male adults of the Alsea and other bands of Indians residing upon the Siletz Reservation in the State of Oregon, which said agreement is as follows:
>
> This agreement made and entered into in pursuance of the provisions of the Act of Congress approved July thirteen, eighteen hundred and nine-two, at the Siletz Agency, Oregon, by Reuben Boise, William H. Odell, and H. H. Harding, on the part of the United States, and the chiefs, headmen, and male adults of the Alsea and other bands of Indians located on said Siletz Reservation, witnesseth:
>
> ARTICLE I
>
> The Indians located on said Siletz Reservation hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to all the unallotted lands within the limits of said reservation, except the five sections described in Article IV of this agreement.

ARTICLE II

In consideration of the lands sold, ceded, relinquished, and conveyed as aforesaid, the United States stipulates and agrees to pay to the Indians located on said Siletz Reservation the sum of one hundred and forty-two thousand and six hundred dollars ($142,600), in payments as follows, to wit:

One hundred thousand dollars ($100,000) shall be deposited in the Treasury of the United States to the credit of the Indians of the Siletz Reservation, in the State of Oregon, which shall bear interest at the rate of five (5) per cent per annum, to be paid annually at the agency on said reservation on the first day of March of each and every year. The balance of said principal sum shall be paid as follows, to wit:

Within three months after the approval of this agreement by Congress there shall be paid to each Indian on said reservation, who shall be of age, to wit: Males of twenty-one years, and females of eighteen years or more, and all married persons, whether they shall be of age or not, the sum of seventy-five dollars ($75) each, and annually thereafter on each interest-paying day, there shall be paid a like sum of seventy-five dollars ($75) to each one who shall have become of age as aforesaid, or who shall have married, whether of age or not (who shall not have been paid seventy-five dollars) during the preceding year, the said sum of seventy-five dollars; and all of the money so held back by the United States to pay said delayed payments shall also draw interest at the rate of five per cent per annum; and the parents of all infants who are

supporting the same shall receive annually all the interest money according to the share pro rata of each infant: *Provided, however,* That in case of all aged or infirm persons, who are incapable of taking care of themselves, the same due and payable to such may be used for the support and care of such persons, in such manner as the Secretary of the Interior may from time to time direct: *And provided further,* That this agreement shall apply only to persons who shall be living and belonging on said reservation at the time of the ratification of the same by Congress.

ARTICLE III

It is hereby further stipulated and agreed that as soon as the lands which have been allotted to the Indians on said Siletz Indian Reservation shall become subject and liable to taxation by the State of Oregon, then the Secretary of the Interior may reserve a part of said interest money, so coming to said Indians, not exceeding one-third thereof for each year, and pay the same to the State and local authorities of the State of Oregon, in lieu of taxation upon the lands allotted to said Indians, under such rules and regulations as he may prescribe or as may be prescribed by law, to secure to the Indians the full enjoyment of the protection of the laws of said State, and a just share of all benefits derived from said payment in lieu of taxes: *Provided,* That all road taxes, which by the laws of the State may be discharged by work, may be so discharged by the Indian owners of said allotted lands on the roads in their respective vicinities: *And provided further,* That Congress may from time to time ap-

propriate and provide to pay any part of said principal sum, so as aforesaid held in trust, as the condition and interests of said Indians may seem to require or justify; *And provided further,* In case said Indians or any portion thereof may desire to be furnished with supplies instead of cash payments of interest or principal, then the Secretary of the Interior may issue such supplies at cost price in such reservation, at the agency therein, in lieu of cash payments of interest, or any part of the principal sum, which may be from time to time appropriated by Congress: *And provided further,* That in case the Secretary of the Interior may at any time be satisfied that any of said Indians are fully competent and capable of managing and taking care of their full pro rata of said purchase money, and that it will be to their interests to receive the same, and that other portions of said Indians are not so capable and competent, then he shall recommend to Congress that sufficient amount of such principal sum so held in trust as provided in section 2 of this agreement shall be appropriated to pay the full pro rata of such competent and capable Indians of such principal fund, and when the same shall have been paid and receipted for personally by each Indian so paid, then such Indians shall have no further interest in said trust fund.

ARTICLE IV

It is further stipulated and agreed that section nine (9) in Township nine (9) south, range 11 west of the Willamette meridian, and the west half of the west half of section five (5), and the east half (½) of section six (6) and the east half of the

west half of section 6, township 10 south, range 10 west, W. M., and the south half of section 8 and the north half of section 17, and section sixteen (16) in township 9 south, range 9, west of the Willamette meridian, and the east half of the northeast ¼, and lot 3, sec. 20, and S. ½ and S. ½ of north half of sec. 21, town 8, range 10 west, W. M., are hereby reserved from sale, and that the timber on said five sections of land may be cut and manufactured by the Indians of said Siletz Reservation for their own use and for sale, under such rules as the Secretary of the Interior shall from time to time prescribe, regulating the cutting of timber, so as to secure an equality of benefits to the Indians, employment for them, and judicious aid to them in becoming self-supporting.

ARTICLE V

It is further agreed that no part of said sum of money so agreed as aforesaid shall ever be applied to the payment of any claim against any of the Indians alleged to have occurred prior to the ratification of this agreement by Congress.

ARTICLE VI

It is further stipulated and agreed that any religious society or other organization not occupying under proper authority, for religious or educational work among the Indians, any of the lands in this agreement ceded, shall have the right for two years from the date of the ratification of this agreement within which to purchase the land so occupied at the rate of $2.50 per acre, the same to be conveyed to such society or organization by patent.

ARTICLE VII

This agreement shall not take effect and be in force until ratified by the Congress of the United States.

In witness whereof the said Reuben P. Boise, William H. Odell, and H. H. Harding, on the part of the United States, and the chiefs, headmen, and other male adults of the Indians residing on said Siletz Reservation, have hereunto set their hands and affixed their seals.

Done at the Siletz Agency, Oregon, this the 31st day of October, A. D. 1892.

REUBEN P. BOISE, [L. S.]
WILLIAM ODELL, [L. S.]
H. H. HARDING, [L. S.]
United States Commissioners.

Committee appointed at general council of Indians, October 29, 1892:

SCOTT LANE [L. S.]; and others:

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same hereby is, accepted, ratified, and confirmed.

That for the purpose of carrying the provisions of this Act into effect there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred and forty-two thousand six hundred dollars, which sum of money shall be paid to the Indians in the manner and form prescribed by articles two and three of the agreement: *Provided,* That none of the money or interest thereon which is by the terms of said agreement to be paid to said Indians shall be applied to the payment of any judgment that has been

or may hereafter be rendered under the provisions of the Act of Congress approved March third, eighteen hundred and ninety-one, entitled "An Act to provide for the adjudication and payment of claims arising from Indian depredations." The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the town-site law and under the provisions of the homestead law: *Provided, however,* That each settler, under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.

That all of the money so held by the United States to pay the delayed payments shall draw interest at the rate of five per centum per annum after the passage of this Act.

That immediately after the passage of this Act the Secretary of the Interior shall under such regulations as he may prescribe, open said lands to settlement after proclamation by the President and sixty days' notice.

U. S. GOVERNMENT PRINTING OFFICE: 1949